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In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-28

IOWA BEEF PROCESSORS, INC.,

Petitioner,

v.

VALLEY VIEW CATTLE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Appendix A of Petition) is reported at 548 F. 2d 1219 (5th Cir. 1977).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether sufficient evidence was presented at trial to support the jury's finding that a cattle buyer was acting as the agent of a meat processor when he purchased cattle from a cattle seller.

INTRODUCTION

This litigation concerns the relationship between petitioner, Iowa Beef Processors, Inc. ("IBP"), and James Louie Heller ("Heller"), a cattle buyer who from 1966 until 1974 was IBP's principal source of beef from the cattle raising and feeding area south of Amarillo, Texas, known as the South Plains. On appeal, the Fifth Circuit agreed with the District Court that sufficient evidence was elicited at trial to allow the jury to conclude that an agency relationship existed between IBP and Heller at the time Heller purchased 259 head of cattle from respondent, Valley View Cattle Company ("Valley View"). Implicit in the three arguments presented by IBP is a request that this Court review the Fifth Circuit's determination that the evidence was sufficient to submit the question of agency to the jury.

ARGUMENT

A. *The Decision Below Raises No Question of Federal Law.*

IBP argues that the refusal by the Fifth Circuit to overturn the jury's finding that Heller was IBP's agent at the time of the Valley View purchase frustrates the Packers and Stockyards Act, 7 U.S.C. §§181 *et seq.* (1958) (Petition, p. 4). In making this argument, however, IBP fails to point to anything in the Act or in the regulations issued thereunder that precludes the recognition that packers may operate through agents in purchasing cattle and that they should be held responsible for the cattle which their agents purchase. It would be impossible to do so since the Act

itself acknowledges the existence of buying agents who operate for packers. *See* 7 U.S.C. §201(d) (1958).

But despite the jury's finding that Valley View's cattle were bought by an agent of IBP, the suggestion is made that requiring IBP to pay for the cattle it purchased from Valley View through its agent would frustrate the teaching of *Mahon v. Stowers,* 416 U.S. 100 (1974), that cattle sellers are not entitled under the Packers and Stockyards Act to a "special favored position in regard to the packer's assets." 416 U.S. at 108. It is obvious, however, that since Valley View seeks no more than to obtain a position *equivalent* to that enjoyed by other vendors from whom IBP bought cattle, holding IBP responsible for the cattle its agent purchased from Valley View would not put Valley View in a "special favored position" with regard to IBP's assets. Valley View has never argued that it is entitled to a favored position over other creditors of IBP, and from the beginning has sought only to be compensated for the cattle which IBP bought through its agent and for which IBP has refused to pay.

IBP also cites the language in *Mahon* that under the Packers and Stockyards Act, a cattle seller must assume the normal risks of a packer's insolvency (Petition, p. 4). The argument fails to recognize that IBP did not become insolvent; if IBP had become insolvent, Valley View, of course, would enjoy a position no better than that enjoyed by other creditors. But although Valley View clearly assumed the risk of IBP's insolvency, it should not be forced to suffer any consequences from the insolvency of IBP's agent, Heller, since nothing in *Mahon* or the Packers and Stockyards Act suggests that the normal principles of agency law are abandoned when a meat packer, as opposed to other purchasers, makes its purchases through the medium of an agent.

It is clear, therefore, that in light of the jury's finding that Heller was IBP's agent at the time of the purchase from Valley View, no issue is raised under the Packers and Stockyards Act, and, thus, this Court's decision in *Mahon* is inapposite.

B. *The Decision Below Was Clearly Correct.*

IBP states that the Fifth Circuit's opinion misapplied Texas agency law on a significant commercial issue (Petition, p. 7). IBP does not argue, however, that the court employed the wrong legal standard in analyzing the relationship between Heller and IBP, and it concedes that "[t]he Fifth Circuit recognized that the rights of the parties must be governed by the Restatement of Agency §14K * * *." (Petition, p. 8). Thus, IBP objects not to any failure by the Fifth Circuit to apply the principles of agency law recognized by Texas courts, but rather to the application of those principles to the specific factual situation involving Heller and IBP.[1] At the heart of IBP's argument, then, is the sufficiency of the evidence on agency produced by Valley View in the trial court.

The burden of a plaintiff alleging agency in Texas was stated by the Court of Civil Appeals in *Central Motor Co. v. Roberson,* 139 S.W.2d 287, 291 (Tex. Civ. App. 1940):

> Slight proof made by plaintiff is sufficient to raise the presumption of agency, where full knowledge of the facts possessed by defendant and is difficult of ascertainment by the plaintiff.

[1] IBP selects four decisions by the Texas Court of Civil Appeals to support its argument that the Fifth Circuit misapplied Texas law in *Valley View*. (Petition, pp. 7-8). Again, IBP does not assert that in those decisions the courts applied a principle of agency law to which the Fifth Circuit failed to adhere. Rather, IBP's argument is premised on a comparison of the facts of those decisions with the facts in *Valley View*. Obviously, the question of agency turns upon the particular facts of the cases, and the failure of particular evidence in the cases selected by IBP to raise conflicting inferences on the question of agency is of little, if any, value in deciding whether the different facts and testimony presented in *Valley View* were sufficient to put the question before the jury. In addition, IBP fails to distinguish cases supporting Valley View's position which bear as much factual similarity to the instant litigation as those selected by IBP. *See, e.g., Alexander Marketing Co. v. Medford,* 170 S.W.2d 809 (Tex.Civ.App. 1943).

In the instant litigation, both the District Court and the Fifth Circuit concurred that Valley View presented enough evidence to allow the jury to find that the requirements of agency as set forth in the *Restatement (Second) of Agency* §14K were satisfied. Admittedly, the considerable body of evidence presented at trial on the question of agency was conflicting, and the Fifth Circuit was clearly correct in its conclusion that "[t]he body of evidence gravitates in two different directions." 548 F.2d at 1224. But to reject the factual conclusion that Heller was IBP's agent at the time of the purchase from Valley View, a conclusion accepted by both lower courts, this Court would be forced to disregard its repeated pronouncement that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *See, e.g., Berenyi v. District Director,* 385 U.S. 630, 635 (1967); *Graver Tank & Mfg. Co. v. Linde Air Products Co.,* 336 U.S. 271, 275 (1949). IBP has made no such showing.

In sum, the Fifth Circuit, as IBP admits, correctly looked to §14K of the *Restatement (Second) of Agency* to determine the requirements of agency under Texas law. The court recognized that the evidence produced by both sides on the question of agency was substantial and conflicting, and it was therefore the province of the jury to decide which evidence to accept and which to disregard. As a result, this Court, like the two lower courts, should refuse to upset the jury's finding.[2]

[2] IBP also mistakenly argues that the verdict should be overturned because the trial court improperly permitted an expert witness to testify that advance payments made to Heller by IBP were illegal under the Packers and Stockyards Act regulations that prohibit packers from financing dealers. 9 C.F.R. 201.68(a). The testimony to which IBP objects did not concern the question

C. ***There Is No Conflict Between Circuits.***

IBP argues that in a 1956 opinion, *Farm Bureau Co-Operative Mill & Supply, Inc. v. Blue Star Foods, Inc.*, 238 F.2d 326 (8th Cir. 1956), the Eighth Circuit interpreted the *Restatement of Agency* in a manner contrary to the holding of the Fifth Circuit in the *Valley View* case, and the conflict requires a resolution by this Court (Petition, p. 10-11). In the *Farm Bureau Co-Op* case, involving the sale of chickens, the court refused to disturb the jury's determination that the purchaser was an independent contractor, noting that the finding of fact was "presumptively correct and on appeal should be sustained unless clearly erroneous." 238 F.2d at 333.

Obviously, there is not the "real and embarrassing conflict of opinion and authority between the Courts of Appeal" that is required to secure review by this Court. *Layne and Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923). Even if the two cases had identical factual settings, which they did not, there would be no conflict between the decisions for two important reasons. First, the decisions clearly are not inconsistent since in each case, the court merely deferred to the factfinding ability of the jury and refused to rule as a matter of law that one side should prevail. Thus, taken together, the decisions stand solely for the proposition that conflicting evidence on the question of agency requires submission of the issue to the jury. To regard the decisions as irreconcilable would be to ignore the deference Circuit Courts must accord jury verdicts. *See* Rule 52(a), Fed. R.

2 *Continued*
of agency, but was relevant to the third theory of Valley View's suit — that IBP accepted the cattle purchased from Valley View in contravention of the good faith requirement of the Uniform Commercial Code §2-403. The *only* reference to the regulations was to explain that one of the reasons that all packers except IBP have refused to extend advances to dealers is that *they* interpret the regulation as prohibiting the procedure. (Tr. 315-17).

Civ. P., and *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969).

A second weakness in IBP's "conflict" argument is that the decisions in *Farm Bureau Co-Op* and *Valley View* were based on the laws of different states. This Court has long taken the position that:

> As to questions controlled by state law * * * conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts. *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938).

As a result, even assuming a direct conflict between *Valley View* and *Farm Bureau Co-Op*, if the conflict may be explained as a divergence between the laws of the two states on which the courts based their decisions, there is no reason for this Court to resolve the inconsistency. A comparison of the authorities relied on by the two courts reveals such a divergence. In *Farm Bureau Co-Op*, the Eighth Circuit followed a decision by the Missouri Supreme Court, *Skidmore v. Haggard*, 341 Mo. 837, 110 S.W.2d 726 (1937), and looked to §220 of the *Restatement of Agency*, entitled "Definition of a Servant," to establish the difference between an agent and an independent contractor. The Eighth Circuit noted that in *Skidmore*, the Missouri Supreme Court quoted from a comment to §220 in defining agency in Missouri: "[T]hose rendering service but retaining control over the manner of doing it are not servants." 238 F.2d at 334. This restrictive view of agency in Missouri relied upon by the Eighth Circuit in its opinion must be contrasted with the balancing approach mandated by Texas courts in their recognition that §14K of the *Restatement (Second) of Agency*, entitled "Agent or Supplier," governs in a situation such as that presented in the *Valley View*

controversy. Under §14K, one may be an agent for another despite the retention of control over the means of accomplishing the result desired by the principal; the operative question under §14K is not control, but whether the person is acting primarily for the benefit of another and not for himself. Because of this difference in the laws of the states which governed the rights and liabilities of the parties in *Farm Bureau Co-Op* and *Valley View*, there is not a "conflict" between the Circuits necessitating this Court's resolution.

D. *The Decision Below Will Have a Negligible Impact on the Cattle Industry.*

IBP asserts that regarding Heller as the agent of IBP with respect to the Valley View purchase will have broad implications for commercial practices in the cattle industry (Petition, p. 2). The Fifth Circuit cited, in eleven paragraphs of the opinion, the various factual circumstances it considered as tending to establish an agency relationship between Heller and IBP.[3] The important distinction between independent dealers and buyer-agents was recognized by the Fifth Circuit, 548 F.2d at 1222, and its opinion did not purport to re-categorize some independent dealers as buyer-agents. Following a review of the evidentiary materials tending to establish Heller's independence, the court simply concluded, through the application of well-established principles of agency law, that a jury could properly find an agency relationship. There seems to be little chance that the jury's finding of agency, based as it was upon a relationship unique in

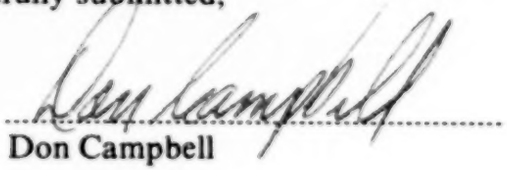
[3] Interestingly, the Fifth Circuit found particularly persuasive the evidence that IBP's advance payments to Heller, coupled with Heller's delayed payments to cattle vendors, permitted Heller to buy cattle which were paid for by IBP's funds channeled through Heller's bank account. Since IBP was the *only* packer conducting business in that manner (Tr. 315, 318), it can be argued that the decision in this case will have an impact only on IBP and the few buyers to whom it occasionally makes advance payments for cattle.

the cattle industry,[4] will have the serious impact IBP hypothesizes.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should dismiss the Petition for a Writ of Certiorari to review the decision of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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[4] It is significant that IBP makes no attempt to characterize the relationship Heller had with IBP as the norm in the cattle industry for independent dealers, and with good reason. If Heller was an independent cattle dealer, he was the only one in the country to have such exclusive and voluminous dealings with a single packer. (Tr. 310).

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Brief for Respondent in Opposition was mailed by certified mail, return receipt requested, to Mr. Edward W. Rothe, Freeman, Rothe, Freeman & Salzman, One IBM Plaza, Suite 3200, Chicago, Illinois 60611, attorney for Petitioner, this 2nd day of August, 1977.

Don Campbell